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WILLIAM D. PHILLIPS
(202) 835-8153

February 18, 1994

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street N.W., Room 222
Washington, D.C. 20554

Re: Ex Parte Presentation - PP Docket 93-253

Dear Mr. Caton:

On February 9, 1994, Cook Inlet Region, Inc., ("CIRI") made an oral ex parte presentation to FCC General Counsel William Kennard in the captioned rulemaking proceeding. On February 9, 1994, CIRI submitted to Mr. Kennard the attached written ex parte presentation, the substance of which was the same as that of the oral presentation. Pursuant to 47 C.F.R. § 1.1206, two copies of this letter and attachment are being filed.

If any questions arise, please contact the undersigned.

Sincerely,

William D. Phillips

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WILLIAM D. PHILLIPS
(202) 835-8153

February 11, 1994

William E. Kennard, Esq.
General Counsel
Federal Communications Commission
1919 M Street, N.W. - Room 614
Washington, D.C. 20554

Re: PP Docket No. 93-253: Competitive Bidding

Dear Mr. Kennard:

On behalf of Cook Inlet Region, Inc. ("CIRI"), we would like to express our appreciation for the time you took in meeting with us to discuss the FCC's consideration of rules concerning competitive bidding for FCC licenses. As we discussed during that meeting, should the FCC, due to its constitutional concerns, elect not to adopt bidding preferences for the minority and woman-owned businesses enumerated by Congress in the newly enacted Section 309(j) of the Communications Act, the Commission can remain true to the intent of Congress by limiting bidding preferences to business concerns owned by those who are socially and economically disadvantaged.

As we also discussed, were the Commission to adopt this approach, it would not be required to develop its own standard for determining disadvantage. Rather, it could employ the criteria already established by the U.S. Small Business Administration ("SBA") for determining whether a business is disadvantaged for purposes of admission to the SBA Minority Small Business and Capital Ownership Development Program, known as the "8(a)" program.

The Commission could simply incorporate by reference into its Rules the following SBA regulations which establish the criteria for a determination of disadvantage: 13 C.F.R. § 124.105 ("Social Disadvantage"); 13 C.F.R. § 124.106 ("Economic Disadvantage"); and 13 C.F.R. § 124.112 ("Concerns owned by Indian tribes, including Alaska Native Corporations"). Copies of those regulations are attached hereto.

The SBA's definition of social disadvantage includes those individuals who can demonstrate that they have been "subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities." 13 C.F.R. § 124.105(a). Individuals can meet that test by demonstrating either that they are members of one of the racial/ethnic groups enumerated in that section, or that, although not members of such a group, they have nevertheless suffered the effects of prejudice, bias or discriminatory practices which have negatively impacted their entry into or advancement in the business world.

The SBA's test of economic disadvantage is found in two separate sections. The test for economic disadvantage in Section 124.112 applies to business concerns owned by Indian tribes and Alaska Native Corporations (such as CIRI), and the test in Section 124.106 applies to all other business concerns. Those tests employ objective economic and financial criteria. It should be noted, however, that Congress has determined that Alaska Native Corporations such as CIRI are presumptively "economically disadvantaged" for purposes of these SBA regulations. See 43 C.F.R. § 1626(e), which is attached, along with language from the House Report adopting that statute.

Some parties commenting in this proceeding proposed that the Commission limit bidding preferences to "small" businesses regardless of economic disadvantage. Some proposed to use SBA standards under which a business is small if it meets one of two tests: (1) it has a net worth of not more than $6 million and an average net income for the preceding two years of not more than $2 million (13 C.F.R. § 121.802(a)(2)(i); or (2) it meets the size standard linked to the Standard Industrial Classification ("SIC") codes (13 C.F.R. § 121.802(a)(2)(ii). CIRI agrees with the assessment of the FCC Small Business Advisory Committee that neither standard is appropriate in this case. Nevertheless, should the Commission adopt any form of the SBA's income or size standards, it must also adopt the SBA's affiliation rules to guard against circumvention of those standards. Those rules are found at 13 C.F.R. § 121.401 (attached hereto). Those affiliation rules do not apply to concerns owned by Indian Tribes or Alaska Native Corporations because Tribes and ANC's hold assets on behalf of individual Native Americans who clearly meet all of the applicable standards for "economically disadvantaged" status.

CIRI appreciated the opportunity to discuss these issues with you. Should you have any questions about what we have presented, please do not hesitate to contact me.

Sincerely,

William D. Phillips

030690-1

§ 124.105 Social disadvantage.

(a) *General.* Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control. For social disadvantage relating to Indian tribes and Alaska Native Corporations, see § 124.112(a).

(b) *Members of designated groups.* (1) In the absence of evidence to the contrary, the following individuals are presumed to be socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China, Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA according to procedures set forth at paragraph (d) of this section.

(2) An individual seeking socially disadvantaged status as a member of a designated group may be required to demonstrate that he/she holds himself/herself out and is identified as a member of a designated group if SBA has reason to question such individual's status as a group member.

(c) *Individuals not members of designated groups.* (1) An individual who is not a member of one of the above-named groups must establish his/her individual social disadvantage on the basis of clear and convincing evidence. A clear and convincing case of social disadvantage must include the following elements:

(i) The individual's social disadvantage must stem from his or her color, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause not common to small business persons who are not socially disadvantaged.

(ii) The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged.

(iii) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries.

(iv) The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant.

(v) The individual's social disadvantage must have negatively impacted on his or her entry into and/or advancement in the business world. SBA will entertain any relevant evidence in assessing this element of an applicant's case. SBA will particularly consider and place emphasis on the following experiences of the individual, where relevant:

(A) *Education.* SBA shall consider, as evidence of an individual's social disadvantage, denial of equal access to institutions of higher education; exclusion from social and professional associations with students and teachers; denial of educational honors; social patterns or pressures which have discouraged the individual from pursuing a professional or business education; and other similar factors.

(B) *Employment.* SBA shall consider, as evidence of an individual's social disadvantage, discrimination in hiring; discrimination in promotions and other aspects of professional advancement; discrimination in pay and fringe benefits; discrimination in other terms and conditions of employment; retaliatory behavior by an employer; social patterns or pressures which have channelled the individual into nonprofessional or non-business fields; and other similar factors.

(C) *Business history.* SBA shall consider, as evidence of an individual's social disadvantage, unequal access to credit or capital; acquisition of credit or capital under unfavorable circumstances; discrimination in receipt (award and/or bid) of government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have impeded the individual's business development.

(d) *Socially disadvantaged group inclusion*—(1) *General.* Upon an adequate preliminary showing to SBA by representatives of an identifiable group that the group has suffered chronic racial or ethnic prejudice or cultural bias, and upon the request of the representatives of the group that SBA do so, SBA shall publish in the FEDERAL REGISTER a notice of its receipt of a request that it consider a group not specifically named in paragraph (b)(1) of this section to have members which are socially disadvantaged because of their identification as members of the group for the purpose of eligibility for the 8(a) program. The notice shall adequately identify the group making the request, and if a hearing is requested on the matter and such request is granted, the time, date and location at which such hearing is to be held. All information submitted to support a request should be addressed to the AA/MSB&COD.

(2) *Standards to be applied.* In determining whether a group has made an adequate preliminary showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this regulation, SBA shall determine:

(i) Whether the group has suffered the effects of prejudice, bias, or discriminatory practices;

(ii) Whether such conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in the Small Business Act; and

(iii) Whether such conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to all small business owners. If it is demonstrated to SBA by a particular group that it satisfies the above criteria, SBA will publish the notice described in paragraph (d)(1) of this section.

(3) *Procedure.* Once a notice is published under paragraph (d)(1) of this section, SBA shall adduce further information on the record of the proceeding which tends to support or refute the group's request. Such information may be submitted by any member of the public, including Government representatives and any member of the private sector. Information may be submitted in written form, or orally at such hearings as SBA may hold on the matter.

(4) *Decision.* Once SBA has published a notice under paragraph (d)(1) of this section, it shall afford a period of not more than thirty (30) days for public comment concerning the petition for socially disadvantaged group status. If appropriate, SBA may hold hearings within such comment period. Thereafter, SBA shall consider all information received and shall render its final decision within 60 days of the close of the comment period. Such decisions shall be published as a notice in the FEDERAL REGISTER. Concurrent with the notice, SBA shall advise the petitioners of its final decision in writing. If appropriate, SBA shall amend this regulation accordingly.

§ 124.106 Economic disadvantage.

(a) *Economic disadvantage for the 8(a) program.* (1)(i) For purposes of the 8(a) program, economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market. In determining economic disadvantage for purposes of 8(a) program eligibility, SBA shall compare the applicant concern's business and financial profile with profiles of businesses in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals.

(ii) This program is not intended to assist concerns owned and controlled by socially disadvantaged individuals who have accumulated substantial wealth, who have unlimited growth potential or who have not experienced or have overcome impediments to obtaining access to financing, markets and resources.

(iii) For economic disadvantage as it relates to tribally-owned concerns, *see* § 124.112(b)(2).

(2) *Factors to be considered.* In determining the degree of diminished credit and capital opportunities of a socially disadvantaged individual, SBA will consider factors relating both to the applicant concern and to the individual(s) claiming disadvantaged status. Factors fall into three general categories: The personal financial condition of the individual(s) claiming disadvantaged status, including that individual's access to credit and capital; the financial condition of the applicant concern; and the applicant concern's access to credit, capital and markets.

(i) *Personal financial condition of the individuals claiming disadvantaged status.* This criterion is designed to assess the relative degree of economic disadvantage of the individual as well as the individual's potential to capitalize or otherwise provide financial support for the business. The specific factors to be considered include but are not limited to: the individual's personal income for at least the past two years; total fair market value of all assets; and the individual's personal net worth. Subject to the exclusion set forth in paragraph (a)(2)(i)(B) of this section, an individual whose personal net worth exceeds $250,000 will not be considered economically disadvantaged for purposes of 8(a) program entry. For personal net worth thresholds relating to continued 8(a) program eligibility, *see* § 124.111(a).

(A)(1) Except as provided in paragraph (a)(2)(i)(A)(2) of this section, when married, an individual upon whom eligibility is based shall submit a financial statement relating to his/her personal finances and a separate financial statement relating to his/her spouse's personal finances. A married applicant individual residing in any of the community property states or territories of the United States (e.g., Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico Texas, Washington and Wisconsin) must clearly identify on his or her financial statement those assets which are his or her separate property and those which are community property. The spouse of such married applicant must similarly identify on his or her financial statement those assets which are his or her separate property and those which are community property. A one-half interest in the assets identified as community property (and income derived from such assets) will be attributed to the applicant individual for purposes of determining economic disadvantage. Assets or a community property interest in assets, which applicant spouse has transferred to a non-applicant spouse within 2 years of the date of application to the 8(a) program will be presumed to be the property of the applicant spouse for purposes of determining his/her personal net worth. However, such presumption shall not apply to any applicant spouse who is subject to a legal separation recognized by a court of competent jurisdiction. A financial statement of a spouse of an applicant is not required if the individual and his/her spouse are subject to a legal separation recognized by a court of competent jurisdiction. However, an applicant individual must include on his or her statement all community property in which he or she has an interest.

(2) Except for concerns where both spouses are individuals upon whom eligibility is based, the requirement of paragraph (a)(2)(i)(A)(1) of this section, relating to the separate financial statements, applies only to determinations of economic disadvantage for purposes of 8(a) program entry. For a concern where both spouses are individuals upon whom program eligibility is based, the personal net worth of each spouse individually will be considered for program certification and for continued program eligibility.

(B) Whenever SBA calculates the personal net worth of an individual claiming disadvantaged status for purposes of the 8(a) program, SBA shall exclude the individual's ownership interest in the applicant or participating 8(a) concern and the equity in his/her primary personal residence, but shall not exclude any portion of such equity in his/her primary residence which is attributable to excessive withdrawals from the applicant or participating 8(a) concern.

(C) Whenever SBA calculates the personal net worth of an individual claiming to be an Alaska Native, as defined in § 124.109, for purposes of qualifying an individually owned 8(a) applicant concern, SBA shall include assets and income from sources other than an Alaska Native Corporation, as defined in § 124.109, and shall exclude from such calculation any of the following which the individual receives from any Alaska Native Corporation:

(*1*) Cash (including cash dividends on stock received from a Native Corporation) to the extent that it does not, in the aggregate, exceed $2,000 per individual per annum;

(*2*) Stock (including stock issued or distributed by a Native Corporation as a dividend or distribution on stock);

(*3*) A partnership interest;

(*4*) Land or an interest in land (including land or an interest in land received from a Native Corporation as a dividend or distribution on stock); and

(*5*) An interest in a settlement trust.

(ii) *Business financial condition.* This criterion will be used to provide a financial picture of a firm at a specific point in time in comparison to other concerns in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals. In evaluating a concern's financial condition, SBA's consideration will include, but not be limited to, the following factors: business assets, revenues, pre-tax profit, working capital and net worth of the concern, including the value of the investments in the concern held

by the individual claiming disadvantaged status.

(iii) *Access to credit and capital.* This criterion will be used to evaluate the ability of the applicant concern to obtain the external support necessary to operate a competitive business enterprise. In making the evaluation, SBA shall consider the concern's access to credit and capital, including, but not limited to, the following factors: Access to long-term financing; access to working capital financing; equipment trade credit; access to raw materials and/or supplier trade credit; and bonding capability.

(b) *Economic disadvantage for the 8(d) Subcontracting Program, Small Disadvantaged Business Set-Asides, Small Disadvantaged Business Evaluation Preferences and for any other Federal procurement programs requiring SBA's determination of disadvantaged status.* (1) For purposes of the section 8(d) Subcontracting Program and other programs requiring SBA's determination of disadvantaged status, economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same or similar line of business and whose diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market. In determining economic disadvantage for the section 8(d) Subcontracting program, Small Disadvantaged Business set-asides and Small Disadvantaged Business Evaluation preferences, SBA will consider the factors set forth in paragraph (a) of this section but will apply standards to each factor that are less restrictive than those applied when determining economic disadvantage for purposes of the 8(a) program. This approach corresponds to the Congressional intent that partial or complete achievement of a concern's 8(a) program business development goals should not necessarily preclude its participation in other Federal procurement programs for concerns owned and controlled by socially and economically disadvantaged individuals.

(2) An individual whose personal net worth exceeds $750,000 as calculated pursuant to paragraph (a)(2)(i) of this section, will not be considered economically disadvantaged for purposes of section 8(d) of the Small Business Act (15 U.S.C. 637(d)) or any Federal procurement program which uses section 8(d) for its definition of economic disadvantage.

[54 FR 34712, Aug. 21, 1989, as amended at 56 FR 34092, Aug. 27, 1990]

§ 124.112 Concerns owned by Indian tribes, including Alaska Native Corporations.

(a) *General.* (1) Small business concerns owned by Indian tribes are eligible for participation in the section 8(a) program, provided that certain conditions are met as described below. The term "Indian tribe" is defined in § 124.109.

(2) Small business concerns owned and controlled by Indian tribes are generally considered socially and economically disadvantaged for purposes of participation in programs authorized by section 8(d) of the Small Business Act, section 1207(a) of the Defense Authorization Act of 1987 and any other program, except the 8(a) program, which requires social and economic disadvantaged status as a condition of eligibility. If the disadvantaged status of a tribally-owned concern is challenged under subpart B of this part, SBA will evaluate the concern's disadvantaged status using the criteria set forth in this section.

(3) Small business concerns owned and controlled by Alaska Native Corporations (ANCs) are eligible for participation in the 8(a) program, subject to the same conditions as apply to tribally-owned concerns which are described at paragraphs (b) through (e) of this section, with the following exceptions which apply solely to ANC-owned concerns:

(i) In evaluating the economic disadvantage of the ANC, no consideration shall be given to assets or income derived from distributions of the Alaska Native Fund established by the Alaska Native Claims Settlement Act, 43 U.S.C. 1601, *et seq.* Such assets and income should be included and specifically identified on the ANC's financial statements.

(ii) Alaska Natives and descendants of Natives must own a majority of both the total equity of the ANC and the total voting power to elect directors of the ANC through their holdings of settlement common stock. Settlement common stock means stock of an ANC issued pursuant to 43 U.S.C. 1606(g)(1), which is subject to the rights and restrictions listed in 43 U.S.C. 1606(h)(1).

(iii) Even though an ANC can be either for profit or non-profit, a small business concern owned and controlled by ANC must be for profit to be eligible for the 8(a) program. The concern will be deemed owned and controlled by the ANC for purposes of program eligibility so as to satisfy paragraph (c)(3) of this section where the majority of stock or other ownership interest is held by the ANC and holders of its settlement common stock. Both a majority of the total equity and total voting power must be so held.

(iv) Paragraphs (b)(3) (i) and (ii) of this section are not generally applicable to an ANC, provided its status as an ANC is clearly shown in its articles of incorporation and by-laws. Additionally, paragraph (c)(1) of this section is not applicable to the ANC-owned concern to the extent it requires an express waiver of sovereign immunity or a "sue and be sued" clause.

(v) The Alaska Native Claims Settlement Act provides that a concern minority-owned by an ANC shall be deemed to be both owned and controlled by such ANC. Therefore, an individual responsible for control and management of an ANC-owned 8(a) applicant or Participant need not establish personal social and economic disadvantage.

(b) *Tribal eligibility.* In order to qualify a concern which it owns and controls for participation in the 8(a) program, an Indian tribe itself must meet the conditions set forth in paragraphs (b)(1) and (b)(2) of this section. Once an Indian tribe has so established its disadvantaged status, it need not reestablish such status in order to have other businesses that it owns certified for 8(a) Program Participation, unless specifically required to do so by the AA/MSB&COD or his/her designee. The AA/MSB&COD, or designee, may require proof of tribal eligibility during the Program Participation of any tribally-owned business or at any time during the processing of an 8(a) program application from a tribally-owned concern. However, nothing in this paragraph affects the requirement that each tribally-owned concern seeking to be certified for 8(a) Program Participation comply with the provisions of paragraph (c) of this section.

(1) *Social disadvantage.* An Indian tribe meeting the definition set forth in § 124.109 shall be deemed socially disadvantaged.

(2) *Economic disadvantage.* In order to be eligible to participate in the 8(a) Program the Indian tribe must demonstrate to SBA that the tribe itself is economically disadvantaged. This shall involve the consideration of available data showing the tribe's economic condition, including but not limited to, the following information:

(i) The number of tribal members.

(ii) The present tribal unemployment rate.

(iii) The per capita income of tribal members, excluding judgment awards.

(iv) The percentage of the local Indian population below the poverty level.

(v) The tribe's access to capital markets.

(vi) The tribal assets as disclosed in a current tribal financial statement. The statement should list all assets including those which are encumbered or held in trust, but the status of those encumbered or trust assets should be clearly delineated.

(vii) A list of all wholly or partially owned tribal enterprises or affiliates and the primary industry classification of each, as defined in § 124.109. The list must also specify the members of the tribe who manage or control such enterprises or serve as officers or directors.

(3) *Application process—forms and documents required.* Except as provided in paragraph (a)(3)(iv) of this section, in order to establish tribal eligibility to qualify for the 8(a) program, the Indian tribe must submit the forms and documents required of 8(a) applicants generally as well as the following material:

(i) A copy of the tribe's governing document(s) such as its constitution or business charter.

(ii) Evidence of its recognition as a tribe eligible for the special programs and services provided by the United States or by its state of residence.

(iii) Copies of its articles of incorporation and bylaws as filed with the organizing or chartering authority, or similar documents needed to establish and govern a non-corporate legal entity.

(iv) Documents or materials needed to show the tribe's economically disadvantaged status as described in paragraph (b)(2) of this section.

(c) *Business eligibility.* In order to be eligible to participate in the 8(a) program, a concern which is owned by an eligible Indian tribe must meet the conditions set forth in paragraphs (c)(1) through (c)(6) of this section.

(1) *Legal business entity organized for profit and susceptible to suit.* The applicant or participating concern must be a separate and distinct legal entity organized or chartered by the tribe, or Federal or state authorities. Except as provided in paragraph (a)(3)(iv) of this section, the concern's articles of incorporation must contain express sovereign immunity waiver language, or a "sue and be sued" clause which designates United States

Federal Courts to be among the courts of competent jurisdiction for all matters relating to SBA's programs including, but not limited to, 8(a) Program Participation, loans, advance payments and contract performance. Also, the concern must be organized for profit, and the tribe must possess economic development powers in the tribe's governing documents.

(2) *Size.* (i) A tribally-owned applicant concern must qualify as a small business concern as defined for purposes of Government procurement in part 121 of this title. The particular size standard to be applied shall be based on the primary industry classification of the applicant concern. Ownership by the tribe will not, in and of itself, cause affiliation with the tribe or with other entities owned by the tribe. However, affiliation with other tribally-owned entities may be caused by circumstances other than common tribal ownership. (*See* part 121 of this title regarding affiliation.)

(ii) Except as provided in paragraph (c)(2)(iii) of this section, a tribally-owned Program Participant must certify to SBA that it is a small business pursuant to the provisions of part 121 of this title for the purpose of performing each individual contract which it is awarded.

(iii) During its Program Term, a tribally-owned Program Participant may, for up to two 8(a) contracts, be a party to a joint venture which exceeds the applicable size standard, if the joint venture is:

(A) 51 percent or more owned and controlled by the tribally-owned Participant;

(B) Is located on the tribe's reservation or land owned by such tribe;

(C) Performs most of its activities on such reservation or tribally-owned land; and

(D) Employs members of the tribe for at least 50 percent of its total workforce.

(3) *Ownership.* For corporate entities, a tribe must own at least 51 percent of the voting stock and at least 51 percent of the aggregate of all classes of stock. For non-corporate entities, a tribe must own at least a 51 percent interest. No Indian tribe shall own more than one current or former 8(a) Program Participant having the same primary industry classification. Tribally owned Program Participants are subject to the provisions of paragraphs (g) and (h) of § 124.108 relating to ownership by nondisadvantaged individuals and non-8(a) concerns.

(4) *Control and management.* (i) Except for concerns owned by ANCs, the management and daily business operations of a tribally-owned concern must be controlled by an individual member(s) of an economically disadvantaged tribe, who does not manage and control more than one other tribally-owned 8(a) Program Participant. In addition, such manager(s) must be found to possess the requisite management or technical capabilities as determined by SBA. This paragraph does not preclude management of a tribally-owned concern by committees, teams, or Boards controlled by such individuals.

(ii) Members of the tribal council shall not participate in the daily management or on the board of directors of any tribally-owned 8(a) concern without obtaining prior written approval for such participation from SBA.

(iii) Except as permitted by paragraph (c)(4)(i) of this section, members of the management team, business committee members, officers, and directors are precluded from engaging in any outside employment or other business interests which conflict with the management of the concern or prevent the concern from achieving the objectives set forth in its business development plan. This is not intended to preclude participation in tribal or other activities which do not interfere with such individual's responsibilities in the operation of the applicant concern.

(5) *Location and economic benefit.* The primary economic benefits from the concern must accrue to the tribe. A concern located on a designated Indian reservation or on tribally-owned land will be presumed to provide an economic benefit, such as employment, to the tribal community. SBA may approve a location not on tribally-owned land, if the applicant concern can demonstrate that similar economic benefits will accrue to the tribal community.

(6) *Potential for success.* (i) SBA will approve a tribally-owned concern, including a concern owned by an Alaska Native Corporation (ANC), for 8(a) Program participation only when it finds that:

(A) Either the applicant concern has been in business in its primary industry classification for two full years or a waiver is granted pursuant to paragraph (c)(6)(ii); and

(B) The concern meets the requirements of paragraph (c)(6)(iii) regarding potential success.

(ii) The AA/MSBD&COD will waive the two year in business requirement for a tribally-owned concern if he/she finds that the concern has a marketing and development strategy for meeting the 8(a) program competitive business mix requirements of § 124.312 without undue dependence on one or more contracts anticipated to be awarded under 8(a) program authority.

(iii) In determining whether a tribally-owned concern has the potential for success, SBA will look at a number of factors including, but not limited to:

(A) The technical and managerial experience and competency of the individual(s) who will manage and control the daily operations of the tribally-owned concern;

(B) The financial capacity of the tribally-owned concern; and

(C) The concern's record of performance on any previous Federal or private sector contract in the primary industry in which the concern is seeking 8(a) certification.

(7) *Other eligibility criteria.* (i) A tribally-owned applicant concern shall not be denied admission into the 8(a) program due solely to a determination that specific contract opportunities are unavailable to assist the development of the concern unless:

(A) The Government has not previously procured and is unlikely to procure the types of products or services offered by the concern; or

(B) The purchase of such products or services by the Federal Government will not be in quantities sufficient to support the developmental needs of the applicant and other Program Participants providing the same or similar items or services.

(ii) Applicant must meet the eligibility criteria set forth in §§ 124.108 and 124.109.

(d) *Individual eligibility limitation*—(1) *Concerns owned by Indian tribes except those owned by Alaska Native Corporations.* The Small Business Act, as amended, provides that the 8(a) requirements regarding management and daily business operations are met if a tribally-owned concern is controlled by one or more members of the economically disadvantaged Indian tribe. The statute does not require that such individual be found by SBA to be personally socially and economically disadvantaged. Therefore, SBA does not deem an individual involved in the management or daily business operations of the tribally-owned concern to have used his or her individual eligibility within the meaning of § 124.108(c).

(2) *Concerns owned by Alaska Native Corporations.* The Alaska Native Claims Settlement Act, as amended, provides that a concern which is majority owned by an Alaska Native Corporation shall be deemed to be controlled and managed by minority individuals for purpose of participation in Federal programs. Therefore, SBA will not examine the disadvantaged status of an individual involved in the management of daily business operations of an Alaska Native Corporation-owned concern, and such individual will not be deemed to have used his or her individual eligibility within the meaning of § 124.108(c).

(e) *Existing Section 8(a) Firms.* Tribally-owned concerns presently in the section 8(a) program must comply with the requirements of this section within 12 months from the effective date of these regulations. Failure to do so may result in the commencement of section 8(a) program termination proceedings.

[54 FR 34712, Aug. 21, 1989, as amended at 55 FR 33896, Aug. 20, 1990]

§ 1626. Applicability of settlement benefits to other governmental benefits; food stamp program

(e) Minority status

(1) For all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock and by Natives and descendants of Natives, represents a majority of both the total equity of the corporation and the total voting power of the corporation for the purposes of electing directors.

(2) For all purposes of Federal law, direct and indirect subsidiary corporations, joint ventures, and partnerships of a Native Corporation qualifying pursuant to paragraph (1) shall be considered to be entities owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the shares of stock or other units of ownership interest in any such entity held by such Native Corporation and by the holders of its Settlement Common Stock represent a majority of both—

(A) the total equity of the subsidiary corporation, joint venture, or partnership; and

(B) the total voting power of the subsidiary corporation, joint venture, or partnership for the purpose of electing directors, the general partner, or principal officers.

(3) No provision of this subsection shall—

(A) preclude a Federal agency or instrumentality from applying standards for determining minority ownership (or control) less restrictive than those described in paragraphs (1) and (2), or

(B) supersede any such less restrictive standards in existence on February 3, 1988.

ALASKA LAND STATUS TECHNICAL CORRECTIONS ACT OF 1992

P.L. 102-415, see page 106 Stat. 2112

DATES OF CONSIDERATION AND PASSAGE

House: July 27, 1992
Senate: October 1, 1992

Cong. Record Vol. 138 (1992)

House Report (Interior and Insular Affairs Committee)
No. 102-673, July 21, 1992
[To accompany H.R. 3157]

Senate Report (Energy and Natural Resources Committee)
No. 102-349, July 30, 1992
[To accompany S. 1625]

The House bill was passed in lieu of the Senate bill. The House Report (this page) is set out below.

HOUSE REPORT NO. 102-673

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The Committee on Interior and Insular Affairs, to whom was referred the bill (H.R. 3157) to provide for the settlement of certain claims under the Alaska Native Claims Settlement Act, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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PURPOSE AND SUMMARY

The purpose of H.R. 3157, as amended by the Committee on Interior and Insular Affairs, is to resolve issues that have arisen in the implementation of the Alaska Native Claims Settlement Act and the Alaska National Interest Lands Conservation Act and to provide for conveyance of certain lands within the State of Alaska.

BACKGROUND AND NEED

This legislation addresses a number of problems in the implementation of law concerning the allocation and management of lands in Alaska and the laws which affect Alaska Natives. The

This section eliminates language in the original conveyance which has clouded university title. It would not affect the Forest Service lease for the Petersburg property.

Section 10 amends section 29(e) of ANCSA to clarify that Alaska Native corporations are minority and economically disadvantaged business enterprises for the purposes of implementing the SBA programs.

Section 15(e) of the 1987 Amendments to ANCSA (Public Law 100-241) provided that Alaska Native corporations shall be defined as minority business enterprises for as long as a majority of both the total equity and total voting power of the corporation is held by holders of Settlement Common Stock and by Natives and descendants of Natives.

This section would further clarify that Alaska Native corporations and their subsidiary companies are minority and economically disadvantaged business enterprises for the purposes of qualifying for participation in federal contracting and subcontracting programs, the largest of which include the SBA 8(a) program and the Department of Defense Small and Disadvantaged Business Program. These programs were established to increase the participation of certain segments of the population that have historically been denied access to Federal procurement opportunities.

While this section eliminates the need for Alaska Native Corporations or their subsidiaries to prove their "economic" disadvantage the corporations would still be required to meet size requirements as small businesses. This will continue to be determined on a case-by-case basis.

Section 11 amends section 29(g) of ANCSA to clarify that Alaska Native corporations, like Indian tribes, are exempt from the 1964 Civil Rights Act. It allows Alaska Native corporations, partnerships, joint ventures, trusts or affiliates in which the Native corporation owns not less than 25 per centum of the equity to hire their shareholders or other Alaska Natives without discrimination under the Civil Rights Act.

Section 12 amends section 905 of ANILCA to reinstate 50 Native allotment applications made on or before December 18, 1971 within the boundaries of the National Petroleum Reserve—Alaska (NPRA) and directs the Secretary of the Interior to make a determination of the applications within 180 days. Where land has been selected, interim conveyed or patented to a village or regional corporation,

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the Secretary is authorized to accept reconveyance and reduce acreage charged against their entitlement.

In 1923, lands were withdrawn for NPRA. Interpretation of whether this withdrawal precluded issuance of Native allotments in this area was settled by Congress in 1980 in section 905 of ANILCA by approving allotment applications for lands within the NPRA which were pending before the Department on or before December 18, 1971. Despite the intent of section 905 of ANILCA, many lands for which allotment applications had been submitted were already selected and interim conveyed to Native regional and village corporations.

DEFINITIONS

§ 121.401 Affiliation.

(a) *General rule.* (1) Except as otherwise noted, size determinations shall include the applicant concern and all its domestic and foreign affiliates. Moreover, all affiliates, regardless of whether organized for profit, must be included.

(2) Except as otherwise provided in this section, concerns are affiliates of each other when either directly or indirectly

(i) One concern controls or has the power to control the other, or

(ii) A third party or parties controls or has the power to control both, or

(iii) An *identity of interest* between or among parties exists such that affiliation may be found.

(3) In determining whether affiliation exists, consideration shall be given to all appropriate factors, including common ownership, common management, and contractual relationships.

(b) *Exclusion from affiliation coverage.* Portfolio or client concerns owned in whole or substantial part by investment companies licensed, or development companies qualifying under the Small Business Investment Act of 1958, as amended, or by Investment Companies registered under the Investment Company Act of 1940, as amended, concerns owned and controlled by Indian Tribes, or concerns owned and controlled by Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601, *et seq.*) are not considered affiliates of such investment companies, development companies, tribes or Alaska Regional or Village Corporations.

(c) *Nature of control in determining affiliation.* (1) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

Example. A party owning 50 percent of the voting stock of a concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders. Affiliation exists when one or more parties have the power to control a concern while at the same time another party, or other parties, may be in control of the concern at the will of the party with the power to control.

(2) Control can arise through stock ownership; occupancy of director, officer or key employee positions; contractual or other business relations; or combinations of these and other factors.

(3) Control can arise through management positions where a concern's voting stock is so widely distributed that no effective control can be established.

Example. In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of a concern's voting stock, but no officer or director has a block sufficient to give him control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control.

(d) *Identity of interest between and among persons as an affiliation determinant.* Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments in more than one concern. In determining who controls or has the power to control a concern, persons with an identity of interest may be treated as though they were one person.

(e) *Affiliation through stock ownership.*(1) A person is presumed to control or have the power to control a concern if he or she owns or controls or has the power to control 50 percent or more of its voting stock.

(2) A person is presumed to control or have the power to control a concern even though he or she owns, controls or has the power to control less than 50 percent of the concern's voting stock, if the block of stock he or she owns, controls or has the power to control is large as compared with any other outstanding block of stock.

(3) If two or more persons each owns, controls or has the power to control less than 50% of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each such person individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

EXAMPLE: Assume that Firms A and B each own 40 percent of Firm C. Assume further that Firm A has 200 employees, Firm B has 400 employees, Firm C alone has 50 employees and that the applicable size standard is 500 employees. This subsection requires that both Firm A and Firm B be considered to individually control Firm C and that their employees be aggregated with those of Firm C to determine Firm C's size. Therefore, Firm C would be considered other than small because Firm A's employees plus its employees plus Firm B's employees (200 + 50 + 400) would exceed the 500 employee size standard.

(f) *Affiliation arising under stock options, convertible debentures, and agreements to merge.* Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are generally treated as though the rights held thereunder had been exercised. However, an affiliate cannot use such options and debentures to appear to terminate its control over another concern before it actually does so.

EXAMPLE 1. If company "A" holds an option to purchase a controlling interest in company "B," the situation is treated as though company "A" had exercised its rights and had become owner of a controlling interest in company "B." The employees or annual receipts, as the case may be, of both concerns must be taken into account in determining size.

EXAMPLE 2. If large company "A" holds 70% (70 of 100 outstanding shares) of the voting stock of company "B" and gives a third party an option to purchase 50 of the 70 owned by "A" shares of concern "B", company "B" will be deemed to be an affiliate of company "A" until the third party actually exercises its option to purchase such shares. In order to prevent large company "A" from circumventing the intent of the regulation which sells present effect to stock options, the option is not considered to have present effect in this case.

EXAMPLE 3. If company "A" has entered into an agreement to merge with company "B" in the future, the situation is treated as though the merger has taken place.

(g) *Affiliation under voting trusts.* (1) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may qualify as a small business within the size regulations, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction. However, if a voting trust is primarily entered into for a legitimate purpose other than that described above, and it is recognized within the appropriate jurisdiction, it may be considered valid for the purpose of a size determination.

(2) Agreements to divest (including agreements in principle) are not considered to have a present effect on the power to control the concern.

(h) *Affiliation through common management.* Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors and/or the management of another concern.

(i) *Affiliation through common facilities.* Affiliation generally arises where one concern shares office space and/or employees and/or other facilities with another concern, particularly where such concerns are in the same or related industry or field of operations, or where such concerns were formerly affiliated.

(j) *Affiliation with a newly organized concern.* Affiliation generally arises where former officers, directors, principal stockholders, and/or key employees of one concern organize a new concern in the same or a related industry or field of operation, and serve as its officers, directors, principal stockholders, and/or key employees, and the one concern is furnishing or will furnish the other concern with subcontracts, financial or technical assistance, bid or performance bond indemnification, and/or other facilities, whether for a fee or otherwise.

(k) *Affiliation through contractual relationships.* Affiliation generally arises where once concern is dependent upon another concern for contracts and business to such a degree that its economic viability would be in jeopardy without such contracts/business.

(l) *Affiliation under joint venture arrangements.* (1) A joint venture for size determination purposes is an association of concerns and/or individuals, with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(2) For the purpose of financial assistance to a joint venture, the parties thereto are considered to be affiliated with each other. Where the financial assistance, however, is to a concern for its own use, outside the joint venture, an affiliation determination shall not automatically arise from the existence of the joint venture arrangement. In this latter situation, the existence of affiliation shall be determined under these regulations.

(3) Concerns bidding on a particular procurement or property sale as joint venturers are affiliated with each other with regard to performance of the contract. This determination of affiliation does not extend to other contracts or business outside the joint venture arrangement.

(4) An ostensible subcontractor which performs or is to perform primary or vital requirements of a contract may have such a controlling role that it must be considered a joint venturer affiliated on the contract with the prime contractor. In determining whether subcontracting rises to the level of affiliation as a joint venture, SBA considers whether the prime contractor has unusual reliance on the subcontractor.

(5) Even though a concern might not be an affiliate of its joint venturers for the purpose of operations apart from the joint venture, it nevertheless must include its proportionate share of the joint venture receipts or employees in determining its eligibility under the size standards.

(m) *Affiliation under franchise and license agreements.* In determining whether the franchisor controls or has the power to control and, therefore, is affiliated with the franchisee, the restraints, relating to standardized quality, advertising, accounting format and other provisions, imposed on a franchisee by its franchise agreement shall generally not be considered, provided that the franchisee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee may not be controlled by the franchisor by virtue of such provisions in the franchise agreement, control and, thus, affiliation could arise through other means, such as common ownership, common management or excessive restrictions upon the sale of the franchise interest.

[54 FR 52843, Dec. 21, 1989, as amended at 55 FR 27190, July 2, 1990]